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May 15, 2013

*Via Email and Overnight Mail*

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Christopher Knopp, Executive Officer  
Delta Stewardship Council  
980 Ninth Street, Suite 1500  
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Re: Council Meeting, May 16-17, 2013 (Agenda Item 6)  
Proposed Certification of the Final Delta Plan Program  
Environmental Impact Report and Adoption of the Delta Plan and  
Its Rulemaking Package

Dear Mr. Knopp:

On behalf of the San Luis & Delta-Mendota Water Authority ("SLDMWA") and Westlands Water District ("Westlands" or "District"), we submit this comment letter regarding the Delta Stewardship Council's proposed actions in its upcoming meetings, including but not limited to the Council's proposed actions to certify the Final Delta Plan Program Environmental Impact Report ("Final Delta Plan PEIR"), approve the Delta Plan, and adopt regulations.

The SLDMWA and Westlands each provided extensive comments on the proposed Delta Plan and its Draft Delta Plan PEIR in February 2012, as well as further comments on the Recirculated Draft Delta Plan PEIR and the Council's proposed rulemaking package in January and April 2013.<sup>1</sup> Those comments have not been adequately addressed, and as a result, the Delta Plan, its PEIR, and the proposed regulations remain legally deficient. Our further comments are set forth below.

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<sup>1</sup> / We incorporate those comments by reference as if set forth fully herein.

<sup>2</sup> / An Administrative Draft of the EIR/EIS was released for public review on

**I. THE COUNCIL'S RESPONSES TO COMMENTS ARE INADEQUATE, UNSUPPORTED, AND FAIL TO ADDRESS THE FUNDAMENTAL DEFECTS IN THE DELTA PLAN PEIR.**

CEQA requires the Council to evaluate comments on the draft environmental document(s) and provide written responses to comments that raise significant environmental issues in the final EIR. (Pub. Resources Code, § 21091, subd. (d); CEQA Guidelines, 15088, subds. (a) and (c), 15132, 15204, subd. (a).) When a significant environmental issue is raised in comments that object to the draft EIR's analysis, the response must be detailed and must provide a reasoned, good faith response. (CEQA Guidelines, § 15088, subd. (a).) Failure to respond adequately to comments before approving a proposed project frustrates CEQA's informational purposes and renders the environmental document inadequate. (*Flanders Foundation v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603, 615; *Rural Land Owners Association v. City Council* (1983) 143 Cal.App.3d 1013, 1020.)

Broad statements and conclusions unsupported by factual information are not an adequate response; questions raised about significant environmental issues must be addressed in detail. (CEQA Guidelines, § 15088, subd. (c); *City of Maywood v. Los Angeles Unified School District* (2012) 208 Cal.App.4th 362, 391.) The need for a reasoned, factual response is particularly important when critical comments on the draft EIR have been made by other agencies or experts. (*Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1367, 1371.)

In order to satisfy CEQA, the lead agency's responses to comments and the environmental document, as a whole, must reflect a good faith effort at full disclosure. (CEQA Guidelines, § 15204, subd. (a).) As set forth in comments on the draft documents and in further detail below, the Final Delta Plan PEIR falls far short of this standard. The Council's responses to comments continue to gloss over important environmental issues and in no way remedy the draft EIR's failure to satisfy its basic purpose – to adequately describe existing conditions and offer a plausible vision of the foreseeable future.

**A. The project objectives conflict with the Legislature's coequal goals as well as the objectives and effective implementation of the BDCP.**

The Final Delta Plan PEIR offers "master responses" to comments concerning the Council's project description, overall approach to environmental review, and alternatives. In that context, "the meaning of the coequal goals is explored" and the Council makes no substantive changes to the project objectives. (See, e.g., Master Response 3: Alternatives, Final Delta Plan PEIR, p. 3-31.) The Delta Plan and objectives as stated in the Final Delta Plan PEIR fail to reflect the clear legislative direction as summarized in Water Code section 85302, which states in subdivision (d) as follows:

The Delta Plan shall include measures to promote a more reliable water supply that address all of the following:

- (1) Meeting the needs for reasonable and beneficial uses of water.
- (2) Sustaining the economic vitality of the state.
- (3) Improving water quality to protect human health and the environment.

(Wat. Code, § 85302, subd. (d).)

These are fundamental purposes established by the Legislature in the Delta Reform Act to achieve the goal of water supply reliability. (*Ibid.*) The Delta Plan and its EIR do not reflect the objective, fundamental purposes, or a balanced approach to achieving the coequal goals of "providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem." (Wat. Code, § 85054.) The Council's disregard of the Legislature's direction provided in the Delta Reform Act results in a one-sided and overbroad regulatory framework that is likely to impede and potentially prevent successful formulation and implementation of other crucial planning efforts, including the Bay Delta Conservation Plan ("BDCP").

**B. Social and economic impacts are not irrelevant under CEQA and are express considerations of the Council's proposed actions under the Delta Reform Act.**

According to the responses to comments in the Final Delta Plan PEIR, the

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Council's review of the proposed project may gloss over its potential social and economic effects by "tracing the chain of cause and effect." (See, e.g., Master Response 2: Approach to Environmental Review of the Delta Plan, Final Delta Plan PEIR, p. 3-29.) In that context, the Council dismisses public comments concerning reasonably foreseeable physical impacts of the Delta Plan by concluding "there is no substantial evidence that these effects would occur, or that if they occur they would be substantial, adverse physical effects that could not be mitigated." (*Ibid.*) The legal and factual mischaracterizations in the Council's response are numerous. First, the Council lacks any basis for its assumption that all impacts of the Delta Plan can be fully mitigated. Moreover, whether potential impacts can or cannot be mitigated does not excuse the Council's duty to evaluate and disclose those impacts in the EIR and to identify the measures that will mitigate them. The Council's statement is simply false that the record contains "no substantial evidence" of potentially significant adverse physical impacts related to social and economic effects. Numerous comments on the draft documents, including comments by SLDMWA, Westlands, and others, pointed to such evidence.

Furthermore, the duty to investigate, analyze and disclose the potentially significant impacts of the proposed action lies with the lead agency, not the public and not the other public agencies whose service capabilities may be adversely impacted. (Pub. Resources Code, §§ 21002, 21080, subd. (d), 21082.2, subd. (d), 21100, subd. (a), 21151; *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351, 1372; *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1233.) "[U]nder CEQA, the lead agency bears a burden to investigate potential environmental impacts." (*County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1597.) In so doing, the lead agency must consult with any public agency that has jurisdiction over natural resources or other potential environmental impacts of a project – including, in this case, the state and local agencies that submitted expert testimony and evidence of potentially significant adverse effects, which the Council failed to consider. (*Berkeley Keep Jets, supra*, 91 Cal.App.4th at p. 1370.)

Where, as here, a project's physical impacts may cause severe economic and social consequences, the magnitude of the latter is relevant in determining the significance of the proposed action's physical environmental impacts. (CEQA Guidelines, § 15131, subd. (b).) Reduced surface water supplies in agricultural

communities result in fallowing of agricultural land, abandonment and/or destruction of crops, overdraft of groundwater, subsidence, and potentially permanent loss of agricultural resources. These physical environmental impacts lead to lost jobs and increased unemployment, lost business and tax revenue, and increased demand for government services. Particularly given the Legislature's express directive that "[t]he Delta Plan shall include measures to promote a more reliable water supply that address" and sustain "the economic vitality of the state," the Council cannot credibly assert that the impacts of its proposed actions on local communities have been adequately evaluated. (Wat. Code, § 85302, subd. (d); CEQA Guidelines, § 15131, subd. (b).)

**C. The Council's proposed actions violate the Delta Reform Act by impairing the BDCP.**

Like CEQA, the National Environmental Policy Act ("NEPA") prohibits an agency's commitment to a proposed course of action in a manner that forecloses alternatives or mitigation measures prior to completion of environmental review for the whole of the action. (CEQA Guidelines, §§ 15004, subd. (b)(2), 15378, subd. (a); 40 C.F.R. 1501.2.) Since the BDCP planning process was initiated in March 2006, the federal and state administrations have conducted hundreds of public meetings to develop alternatives for one of the most important water supply reliability and habitat conservation planning processes in the nation. The BDCP process is mere months away from releasing a draft EIR/EIS that will identify a preferred alternative for protecting the Delta estuary and restoring reliable water supplies for 25 million Californians and millions of acres of farmland.<sup>2</sup>

In the Delta Reform Act, the Legislature recognized the need for conveyance improvements in the Delta and respected the ongoing BDCP process, providing that the BDCP shall be incorporated into the Delta Plan if the BDCP meets specified criteria. (Wat. Code, §§ 85304, 85320, subd. (e).)

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<sup>2</sup> / An Administrative Draft of the EIR/EIS was released for public review on May 10, 2013, and is available at: <http://baydeltaconservationplan.com/Library/DocumentsLandingPage/EIREISDocuments.aspx>. (See also BDCP EIR/EIS Overview Fact Sheet [[http://baydeltaconservationplan.com/Libraries/Dynamic\\_Document\\_Library/EIR-EIS-Overview\\_Fact\\_Sheet\\_May2013.sflb.ashx](http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/EIR-EIS-Overview_Fact_Sheet_May2013.sflb.ashx)], attached hereto as Exhibit A.)

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Indeed, at the time the Legislature passed the Delta Reform Act, the Legislature contemplated the Bay Delta Plan would be completed prior to the Delta Plan, and as a result, the Delta Plan would be developed around the BDCP, assuming the BDCP met specific requirements. (See e.g., Wat. Code, § 85057.5, subd. (b)(7)(b).) Further, the Delta Reform Act expressly recognizes that the Department of Water Resources, Department of Fish and Wildlife, and agencies other than the Council are "charged with BDCP implementation," and that the Council's authority is limited to making recommendations to the BDCP implementing agencies regarding implementation of the BDCP, which is to be incorporated into the Delta Plan. (Wat. Code, §§ 85031, 85032, 85300, 85320.)

The Delta Plan must be consistent with the goals of the BDCP and cannot impede its effective implementation, particularly with respect to water supply and ecosystem objectives. Those objectives include restoring and protecting the ability of the State Water Project ("SWP") and Central Valley Project ("CVP") to deliver up to full contract amounts when hydrologic conditions result in the availability of sufficient water, consistent with the requirements of state and federal law and the terms and conditions of water delivery contracts and other existing applicable agreements. (Notice of Preparation for BDCP Joint EIS/EIR (Purpose and Project Objectives)/NOI for BDCP Joint EIS/EIR (Purpose and Need for Action).)

The Council nevertheless continues to propose actions that would impede, rather than promote, achievement of the coequal goals, and would be inconsistent with effective implementation of the BDCP. For example, nowhere in the Delta Reform Act did the Legislature authorize the Council to adopt a mandate that state and federal agencies must reduce the quantity of water conveyed through the Delta. Any restrictions on the quantity of water conveyed through the Delta are governed by other statutory and regulatory requirements administered by other state and federal agencies, including the State Water Resources Control Board, Department of Fish and Wildlife, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service. The Council's proposed actions violate federal and state law, including the Delta Reform Act. The Council's proposed actions attempt to regulate the manner in which water is conveyed through the Delta, among other errors, foreclosing agency

consideration of alternatives or mitigation measures prior to completion of environmental review for the BDCP.<sup>3</sup>

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<sup>3</sup> / The Council's broad regulatory overreach and profoundly flawed interpretation of its authority are highlighted in the following excerpt from its responses to comments on the proposed rulemaking package:

As an example, a proposed project involving the export of water from the Delta, such as an increase in the size of existing Delta intakes, will generally be a covered action. The Council can, therefore, regulate that action by requiring it to be consistent with the Plan. Some comments question, however, whether the Council can require that the validity of the covered action turn on, in part, whether it is needed because, say, a Southern California recipient water supplier is failing to conserve water in accordance with the regulation. The Council's authority can be seen by using a proposed expanded Delta intake as an example:

- 1) Pumping water out of the Delta may have significant negative impacts on the Delta's ecosystem and an expanded intake therefore may be contrary to the statutory goal of "protecting, restoring and enhancing the Delta ecosystem." (Water Code, § 85054.)
- 2) The expanded intake should nevertheless be allowed if it is needed to achieve the coequal goal of "providing a more reliable water supply for California." (Water Code, § 85054.)
- 3) But because in this example the water supply goal could be met through out-of-Delta measures without undermining the ecosystem goal, the expanded in-Delta intake is not justified and is inconsistent with the Delta Plan.

(Agenda Item 6c, Attachment 2b.)

The Council's assertion of sweeping authority to regulate Delta water use – of which this Council response is only one example – is legally and factually unsupportable.

**II. THE MITIGATION MEASURES SET FORTH IN THE MONITORING AND REPORTING PROGRAM ARE VAGUE AND UNENFORCEABLE.**

Most, if not all, of the mitigation measures presented in the Final Delta Plan PEIR and proposed Monitoring and Reporting Program are inadequate, either because they do not constitute mitigation as defined under CEQA, are vague and uncertain, or are improperly deferred to future environmental documents without any performance standards or specific criteria to ensure effectiveness and enforceability. (Pub. Resources Code, § 21100, subd. (b)(3); CEQA Guidelines, §§ 15126, subd. (e), 15126.4, 15370.)<sup>4</sup> Many of the so-called mitigation measures are not tethered to any enforceable program or standard, and most do nothing more than state that future projects will comply with applicable law. Even for a programmatic EIR, CEQA requires much more. (CEQA Guidelines, §§ 15144, 15151.) The information presented is far too general, even for a programmatic document, to enable decision-makers to make required CEQA findings as to whether particular mitigation measures would be effective and enforceable, much less whether they would be feasible.

**III. THE COUNCIL'S PROPOSED FINDINGS AND STATEMENT OF OVERRIDING CONSIDERATIONS ARE INADEQUATE AND UNSUPPORTED BY SUBSTANTIAL EVIDENCE.**

Under CEQA, an agency may not "approve or carry out a project" that identifies "one or more significant environmental effects," without making specific written findings that: (1) "changes or alterations" (i.e., avoidance or minimization through alternatives and/or mitigation measures) "have been required in, or incorporated into, the project," which "avoid or substantially lessen" any significant environmental effects identified in the EIR; or (2) that "[s]pecific economic, legal, social, technological, or other considerations" make mitigation measures or project alternatives to lessen a significant environmental impact "infeasible." (CEQA Guidelines, § 15091, subd. (a).) The agencies' findings regarding significant environmental impacts and feasible alternatives and

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<sup>4</sup> / The Council's proposed mitigation measures may also violate the Delta Reform Act by imposing requirements that conflict with the objectives and effective implementation of the BDCP.

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mitigation must be “supported by substantial evidence in the record.” (CEQA Guidelines, § 15091, subd. (b).)

In approving a project that will “result in the occurrence of significant effects” that are not “avoided or substantially lessened,” the agency must “state in writing the specific reasons to support its action based on the final EIR and/or other information in the record” – that is, make a “statement of overriding considerations,” and support that statement “by substantial evidence in the record.” (CEQA Guidelines, § 15093, subd. (b).) It thus follows that, to make the findings required under CEQA regarding a project’s potential significant effects and the feasibility or infeasibility of mitigation measures and alternatives, or to adopt a statement of overriding considerations, the agency’s EIR first must properly identify, evaluate, assess, and analyze the project’s potential environmental impacts. The Council’s proposed actions are in direct conflict with these requirements.

#### **IV. THE COUNCIL’S PERFUNCTORY COST ANALYSIS VIOLATES THE DELTA REFORM ACT AND THE APA.**

The SWP and CVP are important conveyance systems in California. They move water through the Delta to supports the economic engines of the Silicon Valley, the San Joaquin Valley, and southern California. The Council’s cost analysis and fiscal impact statement for the proposed Delta Plan and regulations ignores the importance of that water supply and provides no meaningful information regarding how the Council’s proposed actions will affect these fundamental elements of the state’s economy, as required under both the Delta Reform Act and the rulemaking requirements of the APA. (Wat. Code, § 85302, subd. (d); Gov. Code, §§ 11346.3, 11346.5, 11347.3.) The Council cannot reasonably conclude that its proposed actions include measures to sustain the economic vitality of the state when it has failed to evaluate the economic effects of those actions.

For example, the Council’s proposed actions continue to be based on assumptions that members of the SLDMWA, including Westlands, can fully mitigate for the impact of reduced quantities of water conveyed through the Delta. Yet the Council has failed to analyze in any meaningful way how much replacement water would be needed to mitigate for the reduced supply, potential alternative sources and the barriers to their development and implementation,

how costly such alternative sources might be, and the potentially significant environmental and economic consequences of developing those supplies. Reliability of baseline supplies is crucial to the economic health of the Silicon Valley, the San Joaquin Valley, and southern California, and the Council must analyze the economic costs and benefits of its proposed regulatory actions.

The cost assessment fails to address how the Council's proposed actions will increase the cost of water supplies throughout the state, the extent to which the Council's policies will result in retirement of farmland, job losses in the San Joaquin Valley, and stranded investments (loss of investment in high efficiency irrigation technologies like drip and micro-sprinklers and loss of investment in permanent crops), where there are no or inadequate alternate supplies, or how the Council's proposed actions may result in substantial adverse impacts to economic activities in urban areas. Instead, the cost assessment assumes, without any substantial evidence, that the Council's proposed actions "are expected to provide substantial statewide and regional benefits to housing by increasing value due to improved flood protection, water supply reliability, and environmental amenities" and will "improve the state's prospects for jobs by providing more long-term economic benefits and stability." The Council's assumptions are lacking in evidentiary support and its perfunctory cost analysis violates the requirements of the Delta Reform Act and the APA.

**V. THE PROPOSED DELTA PLAN AND IMPLEMENTING REGULATIONS EXCEED THE COUNCIL'S STATUTORY AUTHORITY AND CONFLICT WITH THE GOALS AND EFFECTIVE IMPLEMENTATION OF THE BDCP.**

The APA requires that the Office of Administrative Law ("OAL") review the Council's proposed regulations using standards of (1) necessity; (2) authority; (3) clarity; (4) consistency; (5) reference; and (6) non-duplication. (Gov. Code, § 11349.) Many of the Council's proposed regulatory actions do not meet these standards. The Council's proposed rulemaking package goes well beyond the agency's authority as set forth in the Delta Reform Act. (Wat. Code, § 85000 et seq.)<sup>5</sup> Furthermore, many of the Council's proposed actions (e.g., asserting the power to stop any covered action that the Council deems inconsistent with the

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<sup>5</sup> / Documents chronicling the legislative history of the Delta Reform Act are attached hereto as Exhibit B.

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Delta Plan) have the effect of regulations yet have not been subjected to the APA's rulemaking procedures and standards for state agencies in California. The Council's proposal to adopt underground regulations violates the requirements set forth in the APA, which are designed to provide the public with a meaningful opportunity to participate in the adoption of state regulations and to ensure that regulations are clear, necessary and legally valid.

The Council sets forth its asserted basis for its regulatory authority in Attachment 2e to the May 16, 2013 agenda packet, which states that the Delta Reform Act requires, by reference to the federal Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 et seq. ("CZMA"), "that the Council include a significant regulatory component in the Delta Plan." (Agenda Item 6c, Attachment 2e ("Basis for the Delta Stewardship Council's Regulatory Authority").) The Council makes the same claim in its Draft Master Responses to comments MR 1-4 and MR7. The Council claims the authority to supplant and amend the already comprehensive regulatory schemes being implemented by other agencies under their existing authorities. Pursuant to the express provisions of the Delta Reform Act, however, the opposite is true. The Delta Reform Act expressly recognizes the continuing authority of other state and federal regulatory regimes over the management and regulation of water and other resources in the Delta. (Wat. Code, §§ 85031, subd. (d), 85302, 85300, subd. (d).)

In previous comments, the SLDMWA and Westlands have explained that the proposed regulations go far beyond the Council's authority to adopt regulations under the Delta Reform Act, and that the various sections the Council cited as authority did not support the proposed actions. In Attachment 2e, and its Draft Master Responses to comments MR 1-4 and MR7, the Council offers Water Code section 85300(d) and the CZMA as a new justification for Council's sweeping regulations. This latest claimed source of authority fails too.

Attachment 2e and the Draft Master Responses correctly observe that Water Code section 85300(d)(1) directs the Council to develop the Delta Plan "consistent with" the CZMA or an "equivalent compliance mechanism." If the Council adopts the Delta Plan pursuant to the CZMA, it must submit the plan to the Secretary of Commerce for approval pursuant to the CZMA. (Wat. Code, § 85300, subd. (d)(2).) To qualify for federal approval, a coastal management program must identify "the means by which the State proposes to exert control

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over the land uses and water uses" within the coastal zone. (16 U.S.C. § 1455(d)(2)(D).) But that does not mean, as Attachment 2e and the Draft Master Responses mistakenly presume, that the Legislature must have intended that the Council itself would have plenary powers.

As the federal regulations implementing the CZMA make clear, the power to implement a coastal management program may rest in a variety of state and local entities. The CZMA regulations provide that "[t]he entity or entities which will exercise the program's authorities is a matter of State determination. They may be the state agency designated pursuant to section 306(d)(6) of the Act, other state agencies, regional or interstate bodies, and local governments." (15 C.F.R. § 923.40(b).) As we have described in previous comments, the Council has an important but circumscribed regulatory role under the Delta Reform Act—to review consistency determinations regarding covered actions. (Wat. Code, §§ 85225-85225.30.) The Delta Reform Act contemplates that the Delta Plan will also rely on the existing authorities of other agencies, for example, the authority of the California State Water Resources Control Board over water diversions, or the California Department of Fish and Wildlife under the Natural Communities Conservation Planning Act. (See Wat. Code, §§ 85031, 85032.) Nothing in the Water Code can reasonably be read to delegate to the Council the sweeping regulatory authority it is claiming.

As evidenced by the Legislature's specific word choices, there was no intent to provide or even imply a regulatory role for the Council with regard to broad water management activities. Indeed, to the contrary, the Council and the Delta Plan are directed to further the coequal goals and provide advisory recommendations to further the achievement of various pertinent state policies, with the *limited* exception of establishing an administrative scheme for reviewing appeals of consistency certifications only applicable to statutorily defined "covered actions" undertaken *in* the Delta and Suisun Marsh. Because the Council is not authorized to impose substantive mandates regarding water use through the Delta Plan, the Council's proposed actions exceed the Council's statutory authority.

In summary, the Delta Plan PEIR remains legally inadequate and fails to minimally comply with CEQA's informational purposes. The provisions of the Delta Plan and proposed regulations exceed the Council's statutory authority and are likely to seriously undermine, rather than promote, the Legislature's coequal

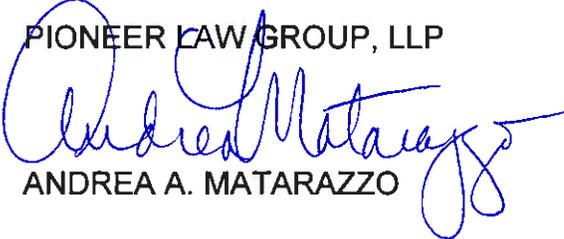
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goals. The Council will violate its duties under CEQA, the Water Code and the APA, and will prejudicially abuse its discretion, if the Final Delta Plan PEIR is certified and the Delta Plan and regulations are approved as proposed.

Thank you for the opportunity to submit these comments. Pursuant to Public Resources Code section 21092.2, please send the Council's Notice of Determination to me at the above address as well as to counsel for SLDMWA, as follows:

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Very truly yours,

PIONEER LAW GROUP, LLP  
  
ANDREA A. MATARAZZO

AAM:jis  
Enclosures

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